

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-3284

United States of America,

Appellee,

v.

Tong Xiong, also known as Johnny,

Appellant.

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Appeal from the United States
District Court for the
District of Minnesota.

[UNPUBLISHED]

Submitted: June 20, 2005

Filed: July 8, 2005

Before LOKEN, Chief Judge, and MORRIS SHEPPARD ARNOLD and
COLLTON, Circuit Judges.

PER CURIAM.

Tong Xiong appeals from his sentence of 97 months for the sexual trafficking of a minor, *see* 18 U.S.C. § 1591. He argues that the district court¹ violated his sixth amendment rights in sentencing him. We disagree and affirm.

The district court sentenced Mr. Xiong on the basis of facts that were contained in his presentence investigation report and to which Mr. Xiong made no objection.

¹The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

Since Mr. Xiong is therefore taken to have admitted these facts, the district court committed no sixth amendment error in arriving at the guideline range applicable to Mr. Xiong's case. *See United States v. Booker*, 125 S. Ct. 738, 755-56 (2005); *United States v. McCully*, 407 F.3d 931, 933 (8th Cir. 2005).

While the district court erred by sentencing Mr. Xiong on the assumption that the sentencing guidelines were mandatory, because this issue was not raised in the district court we review for plain error only. *See United States v. Pirani*, 406 F.3d 543, 548-50 (8th Cir. 2005) (en banc). Our examination of the record does not lead us to conclude that there is reasonable probability that the district court would have given Mr. Xiong a shorter sentence had it been aware that the guidelines were advisory. Mr. Xiong therefore has not established that the error affected his substantial rights, one of the prerequisites for plain-error relief. *See id.* at 550-51.

Affirmed.
